

## THE REAL PARTY IN INTEREST\*

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Ever since the adoption of the original New York Code of 1848 it has been a fundamental requirement of code pleading that every action should be prosecuted in the name of the real party in interest, with an exception in favor of an executor or administrator, a trustee of an express trust or a person expressly authorized by statute.<sup>1</sup> The framers of the Code, in explaining the occasion for the provision, referred to the common law prohibition against the assignment of a "thing in action" and stated this to be the condition of the parties: "If the assignee sues at law, he is turned out of court, and if the assignor sues in equity, he is turned out also." They added: "The true rule undoubtedly is that which prevails in the courts of equity, that he who has the right, is the person to pursue the remedy. We have adopted that rule."<sup>2</sup>

The provision in question has received comparatively little attention from commentators, but has been the subject of widely diverse opinion in the courts. It is believed that a discussion of the problems raised by it in perhaps its two most striking aspects—assignments of choses in action and subrogation—in relation to its historical background and to its connection with the general purpose of the code may serve to clarify it.

### PARTIES PLAINTIFF IN COMMON LAW AND EQUITY PLEADING

The common law judges recognized as plaintiff only one whose *legal* right had been affected by the act of the defendant. A plaintiff must show that he possessed the legal right in controversy, or else he must sue in the name of one who had that right.<sup>3</sup> The plaintiff could not sue unless the common law gave him a right of action for the defendant's breach; the defendant must be a person who could be sued in the particular form of action selected. The claim recognized at law was a relatively narrow one, and took no account of the large body of relations termed equitable. This principle was applied so rigidly that

\* The substance of this article will appear as part of a text on *Code Pleading* to be published by the West Publishing Co., St. Paul, Minn.

<sup>1</sup> N. Y. Laws, 1848, ch. 379, sec. 91; cf. N. Y. C. P. A. 1920, sec. 210.

<sup>2</sup> First Report of the Commissioners on Practice and Pleadings, N. Y. 1848, 124. They say further that the rule "will be found in the form in which we have stated it, in *Field v. Maghee*, 5 Paige, 539; *Rogers v. Traders' Ins. Co.*, 6 Paige, 598; and *Miles v. Hoag*, 7 Paige, 21."

<sup>3</sup> *Anderson v. Martindale* (1801, K. B.) 1 East, 497; *Randoll v. Bell* (1813, K. B.) 1 M. & S. 722; 1 Chitty, *Pleadings* (16th Am. ed. 1879) 1.

in tort actions the only plaintiff was the person wronged, and the only defendant the person who did the wrong;<sup>4</sup> while in contract actions in general only the parties to the contract could be parties to a suit upon it.<sup>5</sup>

In theory the general principle of the courts of law was to disregard equitable interests.<sup>6</sup> Therefore one having an equitable interest could sue at law only in the name of the person having the legal title. The history of the attempt of the assignee of a chose in action to sue at law in his own name is illuminating.<sup>7</sup> The common law judges frequently announced that choses in action were not assignable.<sup>8</sup> Whatever might be the view of equity, the legal title remained in the assignor. He and he only could sue. But very early the assignee obtained permission to bring his action in his assignor's name,<sup>9</sup> and was soon held authorized to use the assignor's name in all legal proceedings.<sup>10</sup> Thus while the theory of the common law that only one having the legal right could sue was never relinquished, a practical invasion of the rule occurred—an invasion which was not permitted in the case of cestuis que trustent or of those having equitable interests in land.<sup>11</sup>

In equity, on the other hand, many parties appeared who could not sue at law.<sup>12</sup> The Chancellor required of parties only that they have a material interest in the suit; that interest could be legal or beneficial. The person having the legal title to the "res" in controversy was generally a necessary party to the bill, so that the legal title might be bound by the decree.<sup>13</sup> But the interest of the assignor of a debt was so nebulous that in equity the assignee alone could appear.<sup>14</sup> Thus "among the earliest petitions (in chancery) preserved we find assignees seeking to recover in their own names debts assigned to them."<sup>15</sup>

<sup>4</sup> *Story v. Richardson* (1839, C. P.) 6 Bing. N. Cas. 123; Dicey, *Rules for the Selection of the Parties to an Action* (2d Am. ed. 1886) 78; 1 Chitty, *op. cit.* 69.

<sup>5</sup> *Anderson v. Martindale*, *supra* note 3; *Eccleston v. Clipsham* (1650, K. B.) 153; 1 Chitty, *op. cit.* 2.

<sup>6</sup> Dicey, *op. cit.* 56; see also 1 Chitty, *op. cit.* 2, 3.

<sup>7</sup> See Cook, *Alienability of Choses in Action* (1916) 29 HARV. L. REV. 816; (1917) 30 *ibid.* 449; Williston, *Is the Right of an Assignee of a Chose in Action Legal or Equitable?* (1916) 30 *ibid.* 97, 99; see also *infra*, p. 263 ff.

<sup>8</sup> Cook, *op. cit.* 29 HARV. L. REV. 822.

<sup>9</sup> *Splidt v. Bowles* (1808 K. B.) 10 East, \*278; *Johnson v. Collings* (1800, K. B.) 1 *ibid.* 98; 1 Chitty *op. cit.* 17.

<sup>10</sup> *Moore v. Coughlin* (1862, Mass.) 4 Allen, 335; *Alsop v. Caines* (1813, N. Y. Sup. Ct.) 10 John. 396, *aff'd* (1815, N. Y. Sen.) 13 John. 9; *Newell v. Hanson* (1924, Vt.) 123 Atl. 208.

<sup>11</sup> Dicey, *op. cit.* 49, 51.

<sup>12</sup> Story, *Equity Pleading* (8th ed. 1870) sec. 72; Rules of Practice for Courts of Equity of the United States, no. 37, 57 L. Ed. 1643.

<sup>13</sup> Story, *op. cit.* sec. 153.

<sup>14</sup> Story, *loc. cit.*; *Day v. Cummings* (1847) 19 Vt. 496.

<sup>15</sup> Barbour, "History of Contract in Early English History," 4 *Oxford Studies in Social and Legal History* (1914) 108.

Equity looked constantly at the substance rather than the form, and ordered that suits be brought by or in the name of "the real party in interest."<sup>16</sup>

#### THE CODE THEORY AS TO PARTIES PLAINTIFF

As we have seen, the framers of the first New York Code announced that they had adopted the equity rule. The express language of the Code was<sup>17</sup> that "every action must be prosecuted in the name of the real party in interest, except that an executor or administrator or a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust within the meaning of this section." The clause as to third party contractors was added in 1851 to remove "the practical inconvenience arising from making the beneficial interest the sole test of the right to sue, and which that section [as to express trusts] was intended to obviate."<sup>18</sup> It would seem that the section as to express trusts was not altogether necessary to obviate that inconvenience. The real party in interest provision has been construed,<sup>19</sup> and wisely, it is thought, as not requiring the plaintiff to have the beneficial interest. One having a naked legal title may be the real party in interest. In the light of this construction, the permission to the trustee of an express trust to sue alone seems to have been granted from a perhaps excessive desire to preserve the privilege of suit to that class of plaintiffs, and not because the real party in interest could be only the person with the beneficial interest.<sup>20</sup>

The question remains: who is the real party in interest? The answer supported by the cases is, as the Code Commissioners themselves said, that the real party in interest is he who by substantive law has the right of action. The codes were not intended to change substan-

<sup>16</sup> Shipman, *Equity Pleading* (1897) sec. 17; Rules of Practice, no. 37, *supra* note 12; *Field v. Maghee* (1836. N. Y. Ch.) 5 Paige \*539.

<sup>17</sup> Bliss' N. Y. C. C. P. 1913, sec. 449. The original code had the real party in interest provision in sec. 91 and the exceptions in sec. 93, referring to them in sec. 91. See First Report of the Commissioners, *supra* note 2, pp. 123-125; see Hinton, *Cases on Code Pleading* (2d ed. 1922) 122, note 1; see also Clark, *The Code Cause of Action* (1924) 33 YALE LAW JOURNAL, 817, esp. note 2. In 1851 there was added "but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." N. Y. Code, 1851, sec. 111. This clause was omitted in later revisions.

<sup>18</sup> Wright, J., in *Considerant v. Brisbane* (1860) 22 N. Y. 389.

<sup>19</sup> See discussion as to assignees for collection, etc., *infra*, p. 268.

<sup>20</sup> See discussion of the exception as to trustees, *infra*, p. 273.

The eagerness of the Commissioners to permit liberal joinder, as in equity, and to settle all phases of a controversy in one suit may be noted on p. 124 of their Report, *supra* note 2.

tive law. Thus in this view whoever formerly had a legal or equitable right of action has such right still. If it be objected that the assignor of a chose in action has no longer any right of action, the reply is that this change is more apparent than real. As we have already observed,<sup>21</sup> the assignor, almost from the first, was merely a nominal plaintiff; he had no right of action. His importance came only from the fact that the actual plaintiff, the assignee, had to use his name to enforce the assignee's right of action. The aim of the codifiers was a unified system of law and equity. If such a system were to be achieved, he who was the real party in interest at law or in equity before the codes must remain so under the combined procedure. Thus the change induced by this section is formal only: a plaintiff who had been able to sue at law in the name of another and in equity in his own name can now sue in his own name before a court administering both law and equity.<sup>22</sup>

In the case of contracts entered into for the benefit of third parties there is not even a formal change.<sup>23</sup> The third party beneficiary sues where he is permitted to do so not because he is the real party in interest, but because he has by the substantive law of the case a right of action. The question is, as it always was: do the relations between promisor and promisee create any right in the third party? Unless they do, he is not the real party in interest. If they do, he does not need this code provision to help him. It is substantially the same question which must be asked in every case under this section. Did the plaintiff formerly have a right of action at law or in equity? If so, he may enforce it to-day; if not, he is no better off by reason of the Code than he was before.

Even so, the interpretation of the section is not free from difficulty, as is indicated by the discordant views of courts and writers on certain points. Professor L. M. Simes has perhaps most clearly presented the proper approach to the subject,<sup>24</sup> though it is believed that he is in error as to one feature of it. He emphasizes the old differences between law and equity which would seem no longer to exist, and this leads him to deprecate the fairly general rule that an insurer may sue in his own name after payment as the subrogee of the insured's rights against the tortfeasor.<sup>25</sup> The learned writer sees in such an action the enforcement of rights both legal and equitable. The existence of such rights he is unwilling to admit. Yet the blended system of law and equity—the fundamental feature of the codes—leads inevitably to that result. The essence of the union of law and equity under the

<sup>21</sup> See *supra*, p. 260.

<sup>22</sup> 1 Williston, *Contracts* (1920) sec. 446; Simes, *The Real Party in Interest* (1921) 10 KY. L. JOUR. 60.

<sup>23</sup> 1 Williston, *loc. cit.*; Simes, *op. cit.* 71; that the Code was at first believed to have changed the rule, see Corbin, *Contracts for the Benefit of Third Persons* (1918) 27 YALE LAW JOURNAL, 1008, 1029.

<sup>24</sup> Simes, *op. cit.* 60.

<sup>25</sup> Simes, *op. cit.* 63, 68, 69.

codes<sup>26</sup> is that now one action may enforce a right which formerly would have required a suit at law and a bill in equity. This is exactly the insurance company's case. Here are involved the legal claim for damages and the equitable theory of subrogation. Before the codes two suits, one at law and one in equity, would have been necessary; but under the reformed procedure there is but one jural right to damages, and that right is in the insurer.

Such a conclusion does not endanger the constitutional guarantee of jury trial. Though the necessity of jury trial in some cases may be admitted, it need not be regarded as settling all pleading questions. After the pleadings have been closed, the selection of the tribunal required should be made according to the issue found. If that issue is one which was formerly triable by jury, it should go to the jury; otherwise the court may try the case.<sup>27</sup> Where an insurance company sues in its own name, the issue of negligence should go to the jury; the issue of subrogation, which was purely equitable, should go to the court, unless he sees fit to order a jury trial. It seems that generally in subrogation cases the jury is present, since there are two issues. There was the legal issue of the creditor against the debtor and the equitable issue of the subrogee against the creditor, a relation somewhat similar to a constructive trust,<sup>28</sup> which the subrogee may enforce against the creditor.<sup>29</sup> Though there is but one cause of action,<sup>30</sup> there are two issues, and the jury may be present through the trial of both. There is no longer any occasion for the insured—who has no interest in the case—to be a party, real or formal.

#### THE ASSIGNEE OF A CHOSE IN ACTION AS PLAINTIFF

In discussing the application of the real party in interest clause we naturally begin with the point to which it was obviously directed: the assignment of choses in action.<sup>31</sup> Modern statutes have practically done away with the common law prohibitions against such transfers. As Professor Throckmorton has put it: "Assignability of choses in action is now the rule and nonassignability the exception."<sup>32</sup>

A late North Carolina case states the prevailing view as to contract rights: "Unless expressly prohibited by statute or in contravention of some principle of public policy, all ordinary business contracts are assignable, and actions for the breach of the same can be maintained

<sup>26</sup> Cf. Clark, *The Union of Law and Equity* (Jan. 1925) 25 COL. L. REV. no. 1.

<sup>27</sup> See Cook, *Equitable Defenses* (1923) 32 YALE LAW JOURNAL, 645; COMMENTS (1923) 32 *ibid.* 707.

<sup>28</sup> 5 Pomeroy, *Equity Jurisprudence* (2d ed. 1892) sec. 2343.

<sup>29</sup> *Loc. cit.* sec. 2349.

<sup>30</sup> See *Gaugler v. Chicago Ry.* (1912, D. Mont.) 79, 82, where the court says in dealing with a case, "there is but a single cause of action involved."

<sup>31</sup> See *supra*, p. 268.

<sup>32</sup> 5 C. J. 849-50.

by the assignee in his own name."<sup>33</sup> Except as to purely personal contracts, this is the usual rule.<sup>34</sup> Claims arising from torts are generally transferable unless the tort was done to the person, feelings, or reputation of the assignor. The customary test is that of survival. If the right of action would, at the death of its original owner, pass to his personal representative, it is assignable.<sup>35</sup> It should be noted, however, that the codes of procedure do not in any sense regulate the assignment of debts. They determine solely the procedural point: who shall sue when an assignment has been validly made? What constitutes a valid assignment remains a question of substantive law as much to-day as at common law.<sup>36</sup>

When such an assignment has been made of an entire debt,<sup>37</sup> the assignee may sue in his own name as the real party in interest under the Code.<sup>38</sup> This is so whether the assignment would formerly have been denominated legal or equitable.<sup>39</sup> Thus an assignee who has a right of action which he formerly could have enforced in his own name in equity and in his assignor's at law, may under the combined procedure enforce that right in his own name.

So it would seem that an assignee who has no beneficial interest, like an assignee for collection only, may prosecute an action in his own name, and many, probably most, American jurisdictions have so held.<sup>40</sup> It is thought that courts refusing to permit such an action<sup>41</sup>

<sup>33</sup> *High Point Casket Co. v. Wheeler* (1921) 182 N. C. 459, 109 S. E. 378.

<sup>34</sup> The exceptions are collected in 4 Cyc. 9, note 11. The statement in the text follows the usual form of expression of the rule. A more exact analysis would indicate that a "contract" as a whole cannot be assigned; that contractual duties cannot be thus escaped, while contractual rights may be transferred, though personal performance by the assignor of specified acts may be a condition precedent to the enforcement of such rights.

<sup>35</sup> See 5 C. J. 850, 4 Cyc. 23.

<sup>36</sup> *Thomas-Bonner Co. v. Hooven* (1920, S. D. Ohio) 284 Fed. 377; as to assignability generally see 1 Williston, *Contracts*, *supra* note 22, secs. 404-447, and cases collected in 5 C. J. 849-897.

<sup>37</sup> Why negotiable instruments do not raise the questions as to plaintiffs brought up by assignments is too well known to require comment here. See Norton, *Bills and Notes* (4th ed. 1914) 18, 19, 21; N. I. L. sec. 1 (4); *Trustees of Union College v. Wheeler* (1874) 61 N. Y. 88.

<sup>38</sup> *Walker v. Mauro* (1853) 18 Mo. 564; *Thomas-Bonner Co. v. Hooven*, *supra* note 36 (Wis. and Ohio Codes); *Denman v. Richardson* (1921, W. D. Wash.) 284 Fed. 592; *Tennent v. Union Central Life Ins. Co.* (1908) 133 Mo. App. 345, 112 S. W. 754; *Seybolt v. Waters* (1922) 109 Neb. 99, 189 N. W. 980.

<sup>39</sup> Note 33 *supra*; *Bowser v. Hines* (1922, Ind.) 137 N. E. 57; *Puterbaugh v. McCray* (1914) 25 Calif. App. 469, 144 Pac. 149; for the common law rule see *Farmers' Exchange v. Lowmney Co.* (1921, Vt.) 115 Atl. 507.

<sup>40</sup> *The Rupert City* (1914, W. D. Wash.) 213 Fed. 263; *Ralph v. Anderson* (1921) 187 Calif. 45, 200 Pac. 940; *Manley v. Park* (1904) 68 Kan. 400, 75 Pac. 557, overruling *Stewart v. Price* (1902) 64 Kan. 191, 67 Pac. 553; *Webb v. Morgan & Co.* (1851) 14 Mo. 305; cf. *Spencer v. Standard Chemical & Metals Corp.* (1924) 237 N. Y. 479, 143 N. E. 651, *infra* note 117.

<sup>41</sup> *Moses v. Ingram* (1893) 99 Ala. 483, 12 So. 374 (partial code state); *Bostwick*

are attempting to decide a question of substantive law by means of a statute whose purpose was the reform of procedure. The only point at issue is whether at law or equity the assignee without beneficial interest acquired any right of action. If he did, he may enforce it under the codes as a real party in interest. Says one learned writer:<sup>42</sup> "The camouflage of a simulated transfer cannot make the transferee the real party in interest—with all due respect to the decisions which under a forced construction hold otherwise." But, of course, if the camouflage of a simulated transfer did make the transferee the real party in interest before the codes, it has the same effect to-day. The codes intend to alter procedure, not substantive rights. So it would seem that one having a naked legal title, or an agent for collection only, may be a real party in interest.<sup>43</sup>

#### ASSIGNOR AS PLAINTIFF

Similarly, the assignor's position, while theoretically changed, is in effect the same as it was under the old practice. The only difference is that the real party in interest clause has eliminated his name—his person was already gone—from the proceedings.<sup>44</sup> The assignor had no control over the action at common law;<sup>45</sup> he has none under the codes.<sup>46</sup>

It is true that the same result is not reached in some states whose practice acts are not identical with the New York Code and in some of the "common law" jurisdictions. For example, the assignor after complete assignment may sue in Connecticut as retaining the legal title.<sup>47</sup> In Delaware his name must be used at law when the debt is

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*v. Bryant* (1888) 113 Ind. 448, 16 N. E. 378; *Brown v. Ginn* (1902) 66 Ohio St. 316, 64 N. E. 123; see also Kerr, *Pleading and Practice* (1919) sec. 586; 64 L. R. A. 581.

For the bearing of Conn. Gen. Sts. 1918, sec. 5655 on this point see *Devine v. Warner* (1903) 76 Conn. 229, 234, 235, 56 Atl. 562.

<sup>42</sup> Kerr, *loc. cit.*

<sup>43</sup> *Morrison v. Veatch* (1923) 190 Calif. 507, 213 Pac. 945; *Greene v. McAuley* (1905) 70 Kan. 601, 79 Pac. 133; *Anderson v. Reardon* (1891) 46 Minn. 185, 48 N. W. 777; *Dyer v. Title Guaranty & Surety Co.* (1919, Wash.) 179 Pac. 834.

<sup>44</sup> *Thomas-Bonner Co. v. Hooven*, *supra* note 36; *Gay v. Orcutt* (1902) 169 Mo. 400, 69 S. W. 295; *Whiting v. Glass* (1916) 217 N. Y. 333, 111 N. E. 1082, reversing 160 App. Div. 915, 145 N. Y. Supp. 1149; and see *Amsler v. Cage* (1923, Tex. Civ. App.) 247 S. W. 669.

<sup>45</sup> *Legh v. Legh* (1799, C. P.) 1 Bos. & P. 447; *Payne v. Rogers* (1780, K. B.) 1 Dougl. 407; *Newell v. Hanson*, *supra* note 10.

<sup>46</sup> *Gay v. Orcutt*, *supra* note 44.

<sup>47</sup> *Smith v. Waterbury Tramway Co.* (1923) 99 Conn. 446, 121 Atl. 873; the practice goes back to a statute of 1864 permitting the equitable and bona fide holder of a chose in action to sue. This was not changed by the adoption of the Code in 1879. Conn. Gen. Sts. 1918, sec. 5655.

not assignable by statute.<sup>48</sup> Suit in his name may, and in certain cases, must be brought in Georgia, Maine, Michigan, and West Virginia.<sup>49</sup> The real party in interest provision is, however, properly construed in most states as imperative; the assignee and he alone may sue.

#### PARTIAL ASSIGNMENTS

Applying the same principle, that the Code did not change substantive law, to partial assignments, we find the question of parties plaintiff to actions thereon much simplified. At common law only the assignor of part of a claim could sue for its recovery. The assignee apparently had no standing even if suing in the name of the assignor or if joined with him.<sup>50</sup> Many cases support this view.<sup>51</sup> The reason for the rule as stated by Story, J. in *Mandeville v. Welch*,<sup>52</sup> is that a debtor should not be subjected to many actions on one obligation; "when he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to other persons."

In equity this reason failed. There the court could order all interested parties to be brought in as plaintiffs or defendants. Therefore the Chancellor generally allowed the transferee to recover what was due him by joining the transferor on one side or the other.<sup>53</sup> As Mr. Justice Holmes remarked in *Richardson v. White*,<sup>54</sup> "There is no longer any doubt that an assignment of part of a fund is good in equity."

<sup>48</sup> *Illinois Finance Co. v. Interstate Rural Credit Assoc.* (1917) 11 Del. Ch. 349, 101 Atl. 870.

<sup>49</sup> *Durrant Lumber Co. v. Sinclair Lumber Co.* (1907) 2 Ga. App. 209, 58 S. E. 485; *Rogers v. Brown* (1908) 103 Me. 478, 70 Atl. 206 (statute permissive); *Michigan Sugar Co. v. Moffett* (1914) 183 Mich. 589, 149 N. W. 1025 (statute permissive); *Miller v. Starcher* (1920) 86 W. Va. 90, 102 S. E. 809 (code held to allow assignee to sue in own name or that of assignor).

For states requiring an assignment in writing, see *Harvey v. Roberts* (1923, Me.) 122 Atl. 409; *New England Cabinet Works v. Morris* (1917) 226 Mass. 246, 115 N. E. 315; *Ovett Land Co. v. Wimberly* (1915) 109 Miss. 601, 68 So. 855.

That the assignee may, in a code state, sue in his own name on a judgment recovered in his assignor's name in a common law jurisdiction, see *Green v. Republic Fire Ins. Co.* (1881) 84 N. Y. 572.

<sup>50</sup> The remarks of Bourquin, J. in *Gaugler v. C. M. & P. S. Ry.* (1912, D. Mont.) 197 Fed. 79, 84, "that at common law as assignor and his partial assignee could join in an action at law in the name of the assignor" do not seem clear. If they refer to a joinder of parties, they are erroneous.

<sup>51</sup> See *Mandeville v. Welch* (1820, U. S.) 5 Wheat. 277; *Rogers v. Penobscot Mining Co.* (1907, C. C. A. 8th) 154 Fed. 606, 614; *Thomas v. Mining Co.* (1880) 54 Calif. 578; *Weinstock v. Bellwood* (1876) 75 Ky. 139; *Andrews Electric Co. v. St. Alphonse Soc.* (1919) 233 Mass. 20, 123 N. E. 103.

<sup>52</sup> *Supra* note 51.

<sup>53</sup> *Andrews Electric Co. v. St. Alphonse Soc.*, *supra* note 51; *Lanigan v. Bradley Co.* (1892) 50 N. J. Eq. 201; cf. *Appeals of Philadelphia* (1878) 86 Pa. 179, 182.

<sup>54</sup> (1896) 167 Mass. 58, 60, 44 N. E. 1072, 1073.



The few cases which have not followed this intelligent rule seem influenced by a narrow construction of equitable powers.<sup>55</sup> The equity side of the Federal courts has taken the more liberal view.<sup>56</sup>

Most code states have properly noted that to preserve the substantive rights enjoyed by the partial assignee before the revision of procedure, the equitable rule and not the rigid regulation of the common law must be adopted. As pointed out by Andrews, J., in *Risley v. Phenix Bank*,<sup>57</sup> the codes give the same facility for bringing in all those concerned that obtained in chancery; he said, "The objection that to allow an assignment of part of an entire claim might subject the debtor to several actions to enforce a single obligation has much less force under a system which requires all parties in interest to be joined as parties to the action." The same court speaking through Parker, C.J. in *Chambers v. Lancaster*<sup>58</sup> said, "It has long been settled in this state that a valid assignment of a part of an entire debt can be made, and . . . the right of an assignee to bring suit on the equity side of the court, making the assignor, as well as the debtor, a party has frequently been resorted to."<sup>59</sup> This would seem a sensible rule. The partial assignee should sue, because he could sue before the codes, but for the protection of the debtor, the assignor should be made a party plaintiff or defendant at the instance of the defendant. Most states reach this result.<sup>60</sup> In order to simplify the proceedings, however, defendant should be required to raise the point by demurrer or answer that the assignor be made a party; otherwise the objection should be held waived.<sup>61</sup> This rule as to waiver has been thought to be the New York view, on the authority of *Dickinson v. Tyson*,<sup>62</sup> but the affirm-

<sup>55</sup> *Burnett v. Crandall* (1876) 63 Mo. 410; *Pickett v. School District* (1916) 193 Mo. App. 519, 526, 186 S. W. 533, 536.

<sup>56</sup> *Rogers v. Penobscot Mining Co.*, *supra* note 51, at p. 614; *Dulles v. Crippen Mfg. Co.* (1907, C. C. D. N. J.) 156 Fed. 706, 709; *Fourth St. Bank v. Yardley* (1896) 165 U. S. 634, 644, 17 Sup. Ct. 439, 440.

<sup>57</sup> (1881) 83 N. Y. 318, 329.

<sup>58</sup> (1899) 160 N. Y. 342, 348, 54 N. E. 707, 708.

<sup>59</sup> The notion, stated in *Danners v. Lugar* (1899, App. T.) 30 Misc. 98, 61 N. Y. Supp. 778, that the assignee may sue alone, since his assignor is estopped by the assignment, seems to have gained no ground in New York; see notes 57 and 58 *supra*, and the New York cases cited *infra*.

<sup>60</sup> See notes 57 and 58 *supra*; also *Martin v. Home* (1922) 190 Calif. 202, 211 Pac. 453; *Campbell v. Holehan* (1920) 48 Calif. App. 568, 192 Pac. 121; *Schilling v. Mullen* (1893) 55 Minn. 122, 56 N. W. 586; *National Union Fire Ins. Co. v. D. & R. G. R. R.* (1913) 44 Utah, 26, 137 Pac. 653; *Delaware County v. Diebold S. & L. Co.* (1889) 133 U. S. 473, 10 Sup. Ct. 399 (Ind. Stat.). That the N. J. Prac. Act, 1903, sec. 19 did not give this result, see *Sternberg v. Lehigh Valley R. R.* (1909) 78 N. J. L. 277, 73 Atl. 39, *aff'd* 80 N. J. L. 408, 78 Atl. 135.

<sup>61</sup> *Delaware County v. Diebold S. & L. Co.*, *supra* note 60; *Dickinson v. Tyson* (1908, 1st Dept.) 125 App. Div. 735, 110 N. Y. Supp. 269; *National Union Fire Ins. Co. v. D. & R. I. R. R.*, *supra* note 60.

<sup>62</sup> *Supra* note 61.

ance,<sup>63</sup> though without opinion, of the Appellate Division's decision in *Carvill v. Mirror Films*<sup>64</sup> is somewhat difficult to reconcile with it. In that case the partial assignee sued in the municipal court, where the pleadings are oral, and which, say the Appellate Division, has no "equitable jurisdiction." The defendant did not, until it was put in evidence at the trial, know there had been an assignment. It was held that under these circumstances defendant had not waived his objection that the assignor should be a party, because he had had no opportunity to register his objection. It is not easy to see why a motion to dismiss when the transfer was put in evidence would not properly have put forward defendant's objection and why, failing to make such motion, he has not waived it. The dissenting opinion of Smith, J., and the prevailing opinion of Bijur, J. in the court below<sup>65</sup> appear to state the decidedly better view. Yet since the case under discussion recognizes that waiver may take place by failure to make objection when there is opportunity, it is at most a modification of the general principle.

These suggestions dispose also of the partial assignor. He is a real party in interest and may prosecute an action as such. In order to prevent splitting, and to settle the whole matter in one suit, the assignee should be made a party on the timely objection of the debtor,<sup>66</sup> this objection to be waived unless seasonably made.

#### ASSIGNMENTS FOR COLLATERAL SECURITY

Professor Hepburn has expressed the opinion that assignments for collateral security should rest on the same footing as partial assignments.<sup>67</sup> This reasoning would permit the assignee to sue only by joining the assignor, assuming the defendant did not waive that objection, and would allow the assignor to sue if he made the assignee a party. A recent Oklahoma case<sup>68</sup> suggests a more satisfactory analogy. There in holding the assignor for security not a necessary party to a suit by the assignee, the court rest their decision on the similarity between the transfer in suit and one under which, though absolute in form, the transferee must account for the proceeds. This places the assignee for security in the same class as the assignee for collection, which is, it is submitted, the common conception of business men. Such

<sup>63</sup> (1919) 226 N. Y. 683.

<sup>64</sup> (1917, 1st Dept.) 178 App. Div. 644, 165 N. Y. Supp. 676, reversing 98 Misc. 650, 163 N. Y. Supp. 268.

<sup>65</sup> *Supra* note 64.

<sup>66</sup> See *Wells v. Crawford* (1912) 23 Colo. App. 103, 127 Pac. 914; *McInnis Lumber Co. v. Rather* (1916) 111 Miss. 55, 71 So. 264; *contra: Cable v. St. Louis M. Ry. & D. Co.* (1885) 21 Mo. 133 (that the partial assignee need not be joined).

<sup>67</sup> 30 Cyc. 51.

<sup>68</sup> *Marker v. Gillam* (1916) 54 Okl. 766, 154 Pac. 351, following *Chicago, R. I. & P. R. R. v. Bankers' Nat. Bank* (1912) 32 Okla. 290, 122 Pac. 499.

assignments are thought to be absolute,<sup>69</sup> transferring the power to prosecute an action thereupon in the assignee's own name. This view makes for convenience and simplicity in business transactions. In conformity with it, many code states refuse to allow the assignor to appear as plaintiff; the assignee sues in his own name.<sup>70</sup> In cases stating the contrary, a decision on the point was usually unnecessary.<sup>71</sup>

#### ASSIGNMENTS PENDENTE LITE

When a chose in action is assigned pendente lite, the codes usually authorize the substitution of the assignee, but the action may be continued in the name of the original plaintiff, or sometimes of the assignee, in the discretion of the court.<sup>72</sup> A recent New York case before the passage of the present practice act expressed the general view that a motion to substitute the assignee is one of favor and not of right.<sup>73</sup> Defendant cannot urge as a bar to the action that it has been assigned since commencement.<sup>74</sup> The transferee acquires complete control over the suit; the assignor may not dismiss it against his objection, nor even obtain a substitution of attorneys.<sup>75</sup>

<sup>69</sup> But see *Hawkins v. Mapes-Reeve Const. Co.* (1904) 178 N. Y. 236, 242, 70 N. E. 783, 784, affirming 82 App. Div. 72, 81 N. Y. Supp. 794, that such assignments are absolute "only upon the happening of such contingencies."

<sup>70</sup> See note 68 *supra*; also *Reynolds v. Louisville Ry.* (1895) 143 Ind. 579, 40 N. E. 410; *Farmers' Exch. Bank v. Crump* (1906) 116 Mo. App. 371, 92 S. W. 724; *von Tobel v. S. & P. Mill Co.* (1903) 32 Wash. 683, 73 Pac. 788. The Washington court apparently requires a reassignment, not merely payment, before suit by the assignor will be allowed.

<sup>71</sup> *Graham v. Light* (1906) 4 Calif. App. 400, 88 Pac. 373, where a reassignment to the plaintiff was made on day of trial; *Hawkins v. Mapes-Reeve Const. Co.*, *supra* note 69, where the primary question in this field was as to the effect of an assignment pendente lite; *Gross v. Heckert* (1904) 120 Wis. 314, 97 N. W. 952, where the debt was extinguished before commencement of the action. That under the Mich. Jud. Act the assignor may sue, see *Grubaugh v. Murphy Co.* (1920) 209 Mich. 551, 177 N. W. 217. Under the Conn. code the assignee may sue only where a sum still remains due on the debt secured greater than the assigned chose's value. *City Bank v. Thorp* (1905) 78 Conn. 211, 218, 61 Atl. 428, 430. Doubtless in Connecticut the assignor could also sue under the rule noted *supra*, note 47.

<sup>72</sup> *Whittier v. Visscher* (1922) 189 Calif. 450, 209 Pac. 23; *Richey Co. v. Mo. Pac. Ry.* (1923) 154 Minn. 154, 191 N. W. 395; Calif. Code Civ. Proc. 1915, sec. 385; Burns' Ann. Ind. Sts. 1914, sec. 272; Minn. Gen. Sts. 1913, sec. 7685; Mont. Code Civ. Proc. 1921, sec. 9086; Neb. Comp. Sts. 1922, sec. 8546; Ohio Gen. Code, 1910, sec. 11261; So. Dak. Rev. Code, 1919, sec. 2317; N. Y. C. P. A. 1920, sec. 83. <sup>73</sup> *Helfand v. Mass. B. & Ins. Co.* (1921, 1st Dept.) 197 App. Div. 759, 189 N. Y. Supp. 246.

<sup>74</sup> See *Dolberry v. Trice* (1873) 49 Ala. 207; *St. Louis S. W. Ry. v. Sharp* (1910, Tex. Civ. App.) 131 S. W. 614.

<sup>75</sup> *King v. Miller* (1908) 53 Ore. 53, 97 Pac. 542, aff'd 223 U. S. 505, 32 Sup. Ct. 243; *Harlan Douglas Co. v. Moncur* (1912) 19 Calif. App. 177, 124 Pac. 1053; *Boqua v. Marshall* (1908) 88 Ark. 373, 114 S. W. 714.

That the rights of the assignee are purely statutory, see *Burdick I. & S. Co. v. Tenenbaum* (1923, Va.) 118 S. E. 502, 505, refusing substitution in the absence of statute.

A question as to who shall be nominal plaintiff arises when the assignor *pendente lite* dies. The personal representative of the deceased will not serve. The assignor had no interest; the estate can have none.<sup>76</sup> The action may continue in the name of the assignee if that is desired, but there is no reason why it may not continue in the name of the deceased assignor. As the California court has put it, "It would seem to be immaterial whether the original party to the action lives or dies."<sup>77</sup> The assignee should be substituted if he or the court so desires. If no motion is made, the suit may proceed as though nothing has happened. When a statute, however, specifically provides for abatement of the action upon the death of a party unless the substitution is made, it is at least safer to make the substitution.

#### SUBROGATION

When an insurance company pays a loss in whole or in part, or where, as is provided by some workmen's compensation statutes,<sup>78</sup> the legal title to the employee's claim is transferred to the insurer on payment by him, a situation is presented analogous to the assignment of a chose in action.<sup>79</sup> Consequently many courts have held that substantially the same rules as those governing the assignment of debts should be applied to these facts. They regard the subrogee as the real party in interest, requiring him to sue alone when he has paid the entire loss, and to make the insured a party when he has paid but a portion of it.

This is the general code rule when the insurer has paid the loss or more. Judge Pound in a late New York case<sup>80</sup> stated the prevailing doctrine: "The action should have been brought in the name of the insurance company alone. No other party has any interest in the claim. The practice of joining the assured as plaintiff when it retains no interest in the subject matter of the action is not to be commended."<sup>81</sup> Formerly a subrogee had no standing in a court of law; his rights were solely equitable.<sup>82</sup> He could sue at law only in the name of the sub-

<sup>76</sup> *Reynolds v. Quaily* (1877) 18 Kan. 361.

<sup>77</sup> *Tuffree v. Stearns Ranchos Co.* (1899) 124 Calif. 306, 309, 57 Pac. 69, 70.

<sup>78</sup> E. g. Calif. Gen. Laws, 1915, Act 21442, sec. 31; Ill. Rev. Sts. 1921, ch. 48, sec. 168. Ind. Acts, 1915, c. 106, sec. 13; Iowa Code Supp. 1913, sec. 2477m6b.

<sup>79</sup> That subrogation may be called an equitable assignment, see Bourquin, J. in *Gaugler v. Chicago, M. & P. S. Ry.* (1912, D. Mont.) 197 Fed. 79.

<sup>80</sup> *Lord & Taylor v. Yale & Towne Mfg. Co.* (1920) 230 N. Y. 132, 141, 129 N. E. 346, 348.

<sup>81</sup> See in accord *Travelers' Ins. Co. v. Gt. Lakes Eng. Works* (1911, C. C. A. 6th) 184 Fed. 426; *Allen v. Chicago N. & W. Ry. Co.* (1896) 94 Wis. 93, 68 N. W. 873; *Employers' Liability Assurance Corp. v. I. & C. Traction Co.* (1923, Ind. App.) 139 N. E. 200, 202, aff'd 142 N. E. 856; see also *Sloat-Darragh Co. v. General Coal Co.* (1921, C. C. A. 6th) 276 Fed. 502, 507, applying same rule to subrogee under guarantor's contract of indemnity. That the same result is reached when there has been an actual assignment of the claim, see *Swift & Co. v. Wabash R. R.* (1910) 149 Mo. App. 526, 131 S. W. 124.

<sup>82</sup> Pomeroy, *Equitable Remedies* (1905) sec. 922, note 92.

rogor.<sup>83</sup> One or two code states, apparently forgetting that their procedure is a blending of law and equity, have been impressed by the common law rule, so that we find them holding that the tortfeasor cannot defeat an action by the insured on the ground that he is not the real party in interest, even though subrogation is admitted.<sup>84</sup> These decisions overlook the fact that the insurer after full payment could sue in equity before the codes and the insured could not.<sup>85</sup> The subrogee thus had substantive rights which we cannot suppose the codes were intended to take away from him. By the substantive law of the case the insurer has the right of action; he is therefore the real party in interest. The change wrought in denying the insured's right of action is formal merely; it is exactly similar to the result reached by the reformed procedure in dealing with the assignor of a chose in action.<sup>86</sup> No objection to this procedure can be based on the supposed necessity of jury trial.<sup>87</sup> We have already noticed that there has always been a legal issue in these cases which has been and still may be passed by on a jury.<sup>88</sup> The defendant's constitutional right is not in danger.

#### PARTIAL SUBROGATION

It would seem perfectly natural to proceed with the analogy of subrogation to assignments in those frequent cases where the insurance

<sup>83</sup> Cf. statement of Connor, J., in *Cunningham v. Seaboard Ry.* (1905) 139 N. C. 427, 435, 51 S. E. 1029, 1032.

This practice still prevails in some common law jurisdictions. *Long v. Kansas City M. & B. R. R.* (1910) 170 Ala. 635, 54 So. 62; *Aetna Ins. Co. v. Hann* (1916) 196 Ala. 234, 72 So. 48; *Atlanta Cadillac Co. v. Manley* (1923, Ga.) 116 S. E. 35; *Pontiac Mut. F. & L. Ins. Co. v. Sheibley* (1917) 279 Ill. 118, 116 N. E. 644.

<sup>84</sup> *Illinois Cent. R. R. v. Hicklin* (1909) 131 Ky. 624, 115 S. W. 752, 23 L. R. A. (N. S.) 870; *Alaska Pac. S. S. Co. v. Sperry Flour Co.* (1917) 94 Wash. 227, 162 Pac. 26; *Foster v. Mo. Pac. Ry.* (1910) 143 Mo. App. 547, 551, 128 S. W. 36, 37.

<sup>85</sup> See note 82, *supra*.

<sup>86</sup> See *supra*, 265.

<sup>87</sup> See *supra*, 263.

<sup>88</sup> *St. Louis I. M. & S. Ry. v. Comm. Union Ins. Co.* (1891) 139 U. S. 223, 235, 11 Sup. Ct. 554, 557; *Holcombe v. Richmond & D. R. Co.* (1887) 78 Ga. 776, 3 S. E. 755; *Peoria M. & F. Ins. Co. v. Frost* (1865) 37 Ill. 333; *Ide v. B. & M. R. R.* (1909) 83 Vt. 66, 74 Atl. 401. These cases show that at common law the action must be brought in the name of the subrogor, and that the jury passed upon the question of negligence. In the *Peoria* case the court said, at p. 337, "The recovery will be for the injury done to the property, and when the judgment is obtained the court will determine as between the different companies how the proceeds of the judgment are to be divided." i. e., the extent to which each is subrogated.

That when the insured has settled with the tortfeasor the insurer may sue in his own name see *Grain Dealers' M. F. Ins. Co. v. M. K. & T. Ry.* (1916) 98 Kan. 344, 157 Pac. 1187; *A. T. & S. F. R. R. v. Home Ins. Co.* (1898) 89 Kan. 432, 53 Pac. 459; *Powell v. Wake Water Co.* (1916) 171 N. C. 290, 88 S. E. 426; compare *Monson v. Payne* (1923) 199 Ky. 105, 250 S. W. 799, with *Ill. Cent. R. R. v. Hicklin*, *supra* note 84.

does not cover the loss, and to determine the real parties in interest as with partial assignments. This theory would make both insurer and insured necessary parties, permitting each to sue on joining the other as plaintiff or defendant. This is the viewpoint of many courts.<sup>89</sup>

The code states generally, however, do not share the conception here contended for. An expression of Judge Dillon in an early case under the Missouri Code<sup>90</sup> has been largely responsible. The learned judge there said, "The suit, though for the use of the insurer, must be in the name of the person whose property is destroyed. The wrongful act was single and individual, and gives rise to but one liability. If one insurer may sue, then, if there are a dozen, each may sue, and if the aggregate amount of all the policies falls short of the actual loss, the owner could sue for the balance. This is not permitted, and so it was held nearly a hundred years ago, in a case whose authority has been recognized ever since, both in Great Britain and in this country. *London Assur. Co. v. Sainsbury*, 3 Doug. 245, 1783." The case referred to by the learned judge is scarcely authority for the proposition for which he cites it. There an evenly divided court held with reluctance,<sup>91</sup> it is true, that a partial insurer could not sue in his own name. But the decision rests squarely on the ground that a subrogee even after payment of the entire loss, or indeed the assignee of a complete assignment, could not sue in his own name at law.<sup>92</sup> We have seen that this reason failed when the real party in interest clause became operative. Now rights of action are constantly transferred, and the transferee sues upon them in his own name.<sup>93</sup> Insurers now sue without objection in their

<sup>89</sup> *Moore v. Taylor* (1916, 3d Dept.) 175 App. Div. 37, 39, 161 N. Y. Supp. 480, 481; *Home Mut. Ins. Co. v. Oregon Ry. & Nav. Co.* (1891) 20 Or. 569, 26 Pac. 857; *Allen-Wright v. Hines, Dir. Gen'l* (1921) 34 Idaho, 90, 200 Pac. 889; *Omaha & R. V. Ry. v. Granite S. F. Ins. Co.* (1898) 53 Neb. 514, 73 N. W. 950; *Pratt v. Radford* (1881) 52 Wis. 114, 8 N. W. 606; *Wunderlich v. Chic. & N. W. Ry.* (1896) 93 Wis. 132, 66 N. W. 1144; *Toledo T. R. R. v. Mauk* (1918) 9 Ohio App. 438. Many of these cases describe insurer and insured as "joint owners of the cause of action."

A few states appear to permit intervention by the insurance company to protect its rights, which seems to be an unnecessary burden on it. See *Shawnee Fire Ins. Co. v. Cosgrove* (1911) 85 Kan. 296, 116 Pac. 819; *Lake Erie & W. R. Co. v. Falk* (1900) 62 Ohio St. 297, 56 N. E. 1020.

<sup>90</sup> *Aetna Ins. Co. v. Hannibal & St. J. R. R.* (1874) Fed. Cas. no. 96. .

<sup>91</sup> Lord Mansfield said, "My leaning is strongly in favor of the plaintiff. . . . It is a great hardship for which I cannot find a remedy." 3 Dougl. at p. 253.

<sup>92</sup> Lord Mansfield: "I take it to be a maxim that as against the person sued the action cannot be transferred. As between the parties themselves the law has long supported it for the benefit of commerce, but the assignee must sue in the name of the assignor. . . . There is no instance of an action in the name of the insurer, while numberless actions have been brought by owners of ships for damage done by other ships, where many of them must have been insured. . . . It is better that the general rule of law should prevail, that as against the person sued the right of action cannot be transferred."

<sup>93</sup> See *supra*, p. 263.

own names when they have paid the whole loss.<sup>94</sup> There can be little doubt from Lord Mansfield's remarks as to what his decision would have been had he been able to avail himself of the provisions of modern codes. Judge Dillon's objection to splitting is readily answered, and in the same fashion as that objection was met in discussing partial assignments.<sup>95</sup> Splitting was never an objection in equity, since the additional parties might be cited in, and with the freedom as to parties in equity incorporated in the codes, it cannot be an objection under present practice. The insured may be made plaintiff or defendant; all interests may be determined in one action. Nevertheless, Judge Dillon's opinion has taken root in our law and is the view of most code states.<sup>96</sup>

#### THE EXCEPTION AS TO TRUSTEES

The fact that the codifiers felt it necessary to add to the real party in interest clause the exception that "an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the suit is prosecuted,"<sup>97</sup> has added greatly to the confusion of the subject. Possibly it is the largest single cause of such confusion. Why did they add this exception if the one with the legal right might sue anyway as a real party in interest? Did they not mean the beneficial and substantial owner as distinguished from the mere holder of the legal right? But as we have seen, after perhaps a little hesitation the courts came to the broader conception of the real party in interest, refusing to limit its meaning to the equitable and beneficial owner merely.<sup>98</sup> They were practically compelled so to do, or else a provision designed to aid in the liberalization of pleading would have turned out vastly to restrict it. Their view was, it seems clear, the only sound one to take. Was it, however, different from the plan of the original codifiers? It is not thought that it was. The codifiers state as their purpose to adopt the equity view that he who had the *right*, should be the one to sue. Further they desired to adopt a more liberal rule as to parties than prevailed at law.<sup>99</sup> Both of these purposes are inconsistent with a restricted definition of the real party in interest. Again the form of the

<sup>94</sup> See *supra*, p. 270.

<sup>95</sup> See *supra*, p. 266.

<sup>96</sup> See *Powell v. Wake Water Co.*, *supra* note 88, at pp. 296, 297, 88 S. E. 430; *So. Bell Tel. Co. v. Watts* (1895, C. C. A. 4th) 66 Fed. 460; *Regan v. N. Y. & N. E. R. R.* (1891) 60 Conn. 124, 22 Atl. 503; *Kansas City, M. & O. Ry. v. Shutt* (1909) 24 Okla. 96, 104 Pac. 51; and see *Hartford Fire Ins. Co. v. Wabash Ry.* (1898) 74 Mo. App. 106, 115. As to the suggestion that the insured may sue alone after payment as the trustee of an express trust, see *Broderick v. Puget Sound T. L. & P. Co.* (1915) 86 Wash. 399, 150 Pac. 616; *Pratt v. Radford* (1881) 52 Wis. 114, 8 N. W. 606, expressing what seems to be a far sounder view.

<sup>97</sup> *Supra* note 1.

<sup>98</sup> See *supra*, p. 264.

<sup>99</sup> *Supra* notes 2 and 20.

original provision is slightly different from that which appeared in the later codes. Instead of the executor, trustee and person authorized by statute appearing as exceptions in the same section with the real party in interest provision, an entirely separate section declares that such person may sue without joining with him the persons for whose benefit the suit is prosecuted.<sup>100</sup> This idea that the fiduciary *may sue alone*, is at least as prominent as that the fiduciary may sue. It seems reasonable to suppose that this provision does not indicate a restricted view of the real party in interest, but was put in out of excess of caution to make it clear (a) that the adoption of the *equity* rule was not intended to prevent any legal title holder from suing and (b) also that it was not intended to compel a joinder in such case. In general, it would seem that a person in the excepted class is also a real party in interest, but it is conceivable that cases may be found where this is not so.<sup>101</sup>

The presence of the exception has had not only the effect noted of tending to restrict the meaning of the real party in interest provision, but has had the opposite tendency of leading some courts to allow persons to sue who formerly had no right of action either at law or in equity. Of course the technical trustee could sue in his own name before the reform of procedure and he still may do so.<sup>102</sup> But an *express* trust, technically speaking, had to be created by the direct and positive act of the parties, by some writing, deed, or will.<sup>103</sup> Some statutes using the term were construed to apply only to trusts in land. For example, in New York it was at first supposed that the phrase

<sup>100</sup> See *supra*, note 17. In the later code, Bliss' N. Y. Civ. Proc. 1913, sec. 449, N. Y. C. P. A. 1920, sec. 210, the excepting clause is made a part of the same sentence containing the real party in interest provision.

<sup>101</sup> Such a case might be where a trust which has become dry is not yet formally terminated. At common law the trustee would still be the one to sue. Under code pleading it seems that the beneficiary should sue instead, as the real party in interest even without a formal transfer of the trust property to him. Cf. *McComas v. Covenant Mut. L. Ins. Co.* (1874) 56 Mo. 573. Yet the formal trustee could still sue under the provision. The assignor of a chose in action might perhaps have been treated in the same way, but since he has transferred away his interest, it is proper to hold that he is not even a formal trustee. In *Considerant v. Brisbane*, *supra* note 18, it is said that there had been some doubt until the amendment adding the provision as to the agent was passed whether a factor or similar agent who could have sued at common law was permitted to sue under the codes. In *People's O. & F. Co. v. C. & W. C. Ry.* (1909) 83 S. C. 530, 65 S. E. 733, it was held that one who had assigned his claim to three different assignees might sue as trustee of an express trust.

<sup>102</sup> See *Perkins v. Gross* (1924, Ariz.) 224 Pac. 620; *Fransham v. Tow Bros.* (1923) 196 Iowa, 1082, 196 N. W. 71. That when the trustee has the legal title the averment of trusteeship may be regarded as surplusage, see *Koch v. Story* (1910) 47 Colo. 335, 338, 107 Pac. 1093.

That the exception in favor of the trustee is permissive only, see *Hubbell v. Medbury* (1873) 53 N. Y. 98; for cases where *cestui* and trustee join, see *Citizens' Trust Co. v. Tindle* (1917) 272 Mo. 681, 199 S. W. 1025; *Gulbranson-Dickinson Co. v. Hopkins* (1919) 170 Wis. 326, 175 N. W. 93.

<sup>103</sup> *Considerant v. Brisbane*, *supra* note 18.



referred to trusts of realty authorized by the Revised Statutes, and there called express trusts.<sup>104</sup> Shortly, however, the New York courts decided to include in the term all contracts where one person acts for or on behalf of another.<sup>105</sup> In 1851 this definition was added to the statute so as to provide that a trustee of an express trust, within the meaning of the section, shall be construed to include "a person with whom, or in whose name, a contract is made for the benefit of another."<sup>106</sup> This gloss was carried over into the codes of practically all the code states. In many, including the New York Civil Practice Act of 1920, it appears as a separate exception rather than as a definition of trustee of an express trust.<sup>107</sup> In general the codes have construed the words "express trust" with great liberality.<sup>108</sup>

Thus we find it said that the trust need not be formal or even in writing.<sup>109</sup> On special demurrer a mere statement that plaintiff is trustee is good; naming the beneficiary, or showing an express trust is not required.<sup>110</sup> A foreign executor, or a trustee under foreign law, has been allowed to sue alone under the code provision.<sup>111</sup> Agents for disclosed or undisclosed principals have made great use of the theory that they are trustees of express trusts, so that the fact that an agent for a disclosed principal is not generally considered the real party in interest does not debar him from suing if the contract is considered to be made in his name.<sup>112</sup> An assignee for collection or suit is sometimes

<sup>104</sup> *Grinnell, Minturn & Co. v. Schmidt* (1850, N. Y.) 4 Super. Ct. 706, 709.

<sup>105</sup> *Ibid.* at p. 710.

<sup>106</sup> N. Y. Code, 1851, sec. 113; *Considerant v. Brisbane*, *supra* note 18.

<sup>107</sup> N. Y. C. P. A. 1920, sec. 210; see codes collected, Sunderland, *Cases on Code Pleading* (1913) 25.

<sup>108</sup> See cases cited *infra*.

<sup>109</sup> *Fidelity & Casualty Co. v. B. & B. Co.* (1899) 105 Ky. 253, 48 S. W. 1074; *contra: Wiehtuechter v. Miller* (1918) 276 Mo. 322, 208 S. W. 39.

<sup>110</sup> *Sansom v. Ayer & Lord Tie Co.* (1911) 144 Ky. 555, 139 S. W. 778. A contract must be alleged where the plaintiff sues as a third party. *Novick v. Washington* (1919, Sup. Ct. Tr. T.) 176 N. Y. Supp. 387, 388.

<sup>111</sup> *Doe v. Ten'no C. & I. Co.* (1906) 43 Wash. 523, 86 Pac. 938; *Kokusai etc. v. Argos Merc. Corp.* (1922, C. C. A. 6th) 280 Fed. 700, cert. denied, 42 Sup. Ct. 463. It seems clear that the question here involved is one of the relations between states rather than of pleading. The general rule is that foreign fiduciaries have no legal right to sue without qualification before the court of the forum but are often permitted to do so upon principles of comity between states. 1 Woerner, *American Law of Administration* (3d ed. 1923) 558-60. For a similar rule as to foreign receivers see *Mahon v. Ongley Electric Co.* (1898) 156 N. Y. 196, 50 N. E. 805; 1 Clark, *Receivers* (1918) sec. 427.

<sup>112</sup> *Kelley-Clarke Co. v. Leslie* (1923) 61 Calif. App. 559, 215 Pac. 699; *Harris v. Clayton* (1921) 186 Calif. 445, 199 Pac. 776; *Owen v. Harriott* (1911) 47 Ind. App. 359, 94 N. E. 591; *Middleton v. Wohlgemuth* (1910, 2d Dept.) 141 App. Div. 678, 126 N. Y. Supp. 734; *Gray v. Cavalliotis* (1921, E. D. N. Y.) 276 Fed. 565; *Lewis v. Home Ins. Co.* (1922, 1st Dept.) 199 App. Div. 556, 192 N. Y. Supp. 170, *aff'd* 181 N. Y. Supp. 839 (warehouseman); see also 41 L. R. A. (N. S.) 641, note; Mechem, *Agency* (2d ed. 1914) 2028; *contra: Perry v. Swanner* (1909) 150 N. C. 141, 63 S. E. 611; *Chapman v. McLawhorn* (1909) 150 N. C. 166, 63 S. E. 721.

held the trustee of an express trust;<sup>113</sup> and the pledgee of a note after default of the pledgor has been put in the same class.<sup>114</sup> The clause has been extended also to include a partner holding funds for the firm or contracting for it.<sup>115</sup>

From these examples it will be seen that the exact extent of the clause is not clear on the authorities. Some textwriters have urged that a halt should be called when the trust is not express;<sup>116</sup> but it is obvious that the courts have not halted there. The solution would seem to be found, as it is found in the case of the real party in interest, in requiring the plaintiff to have some interest which would have entitled him to sue before the codes.<sup>117</sup>

By no means all of the difficult problems concerning the real party in interest have been considered above.<sup>118</sup> It is believed, however, that the principles that have been developed here will point the way to the solution of such problems. In ascertaining who is the real party in interest to be the plaintiff in an action, the method is to discover the person who by substantive law has a right of action on the facts in issue. If one has a right of action on equitable principles, he is now the real party in interest in a case normally to be tried to the court; if one has a right of action on legal principles, he is now the real party in interest in a jury case. Neither can be considered exclusively the real party in interest on the cause, for each is such party as to the right of action which the law gives him.

<sup>113</sup> *Barrett v. C. M. & St. P. Ry.* (1920) 190 Iowa, 509, 175 N. W. 950; *Citizens' Trust Co. v. Tindle*, *supra* note 102. It is believed simpler to think of such an assignee as the real party in interest.

<sup>114</sup> *Winnemucca S. B. & T. Co. v. Corbeil* (1919) 42 Nev. 378, 178 Pac. 23.

<sup>115</sup> *Davidge v. Guardian Trust Co.* (1909, 3d Dept.) 136 App. Div. 78, 120 N. Y. Supp. 628, reversed on other grounds 203 N. Y. 331, 96 N. E. 751; *Weber v. Columbia Amusement Co.* (1914, 1st Dept.) 160 App. Div. 835, 146 N. Y. Supp. 53; but see *Natter v. Blanchard* (1912, 1st Dept.) 153 App. Div. 814, 138 N. Y. Supp. 969.

<sup>116</sup> Pomeroy, *Code Remedies* (3d ed. 1894) sec. 100; Hepburn, 30 Cyc. 90.

<sup>117</sup> While there is some language in *Considerant v. Brisbane*, *supra* note 18, and cases which follow it (see *Gray v. Cavalliotis*, *supra* note 112) that an agent may sue though the contract was such that he would not have been permitted to before the codes, the actual decisions show that in general the courts have not extended the doctrine to quite that point. The courts have tended to hold that the agent must be one with whom the contract was *legally* made, not one who merely made the contract for his principal. See *Considerant v. Brisbane*, *supra* note 18; *Gray v. Cavalliotis*, *supra* note 112. Thus the New York doctrine, set forth by *Considerant v. Brisbane*, is to that effect. In *Spencer v. Standard C. & M. Corp.* (1924) 237 N. Y. 479, 143 N. E. 651, a mere agent who could not have sued at law or equity is not permitted to sue under the Code as trustee of an express trust, and for that reason. *Albany & R. Co. v. Lundberg* (1887) 121 U. S. 451, 7 Sup. Ct. 958. Hence this exception, if it be one, to the general principle that the codifiers did not plan to change substantive law is one of very small compass. See Mechem, *op. cit.* 2028. Compare also *McFadden v. Clark* (1916) 106 S. C. 495, 91 S. E. 799; *Mitchell v. St. Mary* (1897) 148 Ind. 111, 47 N. E. 224.

<sup>118</sup> See, e. g. suits by the equitable owner of realty or personalty.